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# Undocumented Migrant Workers in a Fragmented International Order

CHANTAL THOMAS<sup>†</sup>

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This Paper tries to show the effects of a central challenge of contemporary global governance: the “interaction between normative orders that are fundamentally different in their underlying conceptual structure.”<sup>1</sup> The argument is that the dynamics of globalization create and accentuate particular social phenomena as well as efforts towards coordinated regulation of these phenomena, but that the latter are far from sufficient to meet the former. A further assertion is that global relations and distributions of power determine the operation of this fragmented framework. Social vulnerability is reflected in and reinforced by it. As such, the undocumented migrant worker challenges, in many senses of the term, the *margins* of global governance and international law: the boundaries reflected in sovereign territoriality which continue to undergird international law, and to represent the limits of its permissible jurisdiction, and yet which are challenged by the aspiration towards globalization embodied physically in the person of the undocumented migrant worker.

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<sup>†</sup> Professor of Law, Cornell Law School. Sincere thanks to the editors of the *Maryland Journal of International Law* for their assistance. I am grateful to the University of Maryland School of Law, and especially Professors Michael Van Alstine and Peter Danchin, for assembling such a fantastic conversation. Earlier versions of this Paper were presented to meetings of the Law and Society Association and the Labor Law and Development Research Network; my thanks to the participants in those discussions for their valuable comments. Errors are of course mine alone.

1. Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC'Y REV. 869, 873 (1988).

In this sense, the undocumented migrant both fulfills and transgresses the global order. This Paper represents a series of meditations on this theme. Parts I and II indicate the broader reaches of this analysis, discussing “illegal markets” in the global order more generally and clarifying theoretical and methodological commitments. Parts III and IV examine in more detail the figure of the undocumented migrant worker at both the international and national plane. Parts V and VI “cash out” both the material and discursive effects of the current approaches to irregular migration.

### I. THE ILLEGAL MARKETS PROJECT

This Paper was originally inspired by a project on illegal global markets, primarily organized crime, drugs, prostitution, trafficking, and migrant smuggling.<sup>2</sup> Although these are very different types of transactions, my general argument is the same: first, these illegal markets are an inherent part of globalization; second, the emerging posture of prohibitionism may not reduce the incidence of illegal markets and may actually exacerbate their harmful characteristics.

Call these illicit markets the dark side of globalization.<sup>3</sup> On globalization’s “bright side,”<sup>4</sup> trade facilitated by multilaterally coordinated market rules yields aggregate welfare gains.<sup>5</sup> On this dark side, in law’s shadow, massive disparities between (poor)

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2. See, e.g., Chantal Thomas, *International Law Against Sex Trafficking in Perspective* (Oct. 2004) (unpublished paper presented at the Wisconsin-Harvard Workshop on International Economic Law and Transnational Regulation) (on file with author) [hereinafter Thomas, *International Law Against Sex Trafficking*]; Chantal Thomas et al., *From the International to the Local in Feminist Legal Responses: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 336 (2006) [hereinafter Thomas et al., *From the International to the Local in Feminist Legal Responses*]; Chantal Thomas, *Globalization and the Border*, 41 MCGEORGE L. REV. (forthcoming 2010) (14th Annual Distinguished Speakers Series) [hereinafter Thomas, *Globalization at the Border*].

3. See Moisés Naím, *The Fourth Annual Grotius Lecture: Five Wars of Globalization*, 18 AM. U. INT’L L. REV. 1, 13 (2002). For a treatment of the “dark side” of international humanitarian and human rights law, see DAVID KENNEDY, *THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* (2004).

4. See Curtis J. Milhaupt & Mark D. West, *The Dark Side Of Private Ordering: An Institutional and Empirical Analysis of Organized Crime*, 67 U. CHI. L. REV. 41, 43 (2000). The usage here reflects that of Milhaupt to discuss domestic illicit trade. *Id.*

5. For a discussion of the distributive consequences of trade liberalization, see generally Joel R. Paul, *Do International Trade Institutions Contribute to Economic Growth and Development?*, 44 VA. J. INT’L L. 285 (2003).

“sending” and (rich) “receiving” countries combine with sophisticated technologies of production and distribution to produce volatile dynamics of supply and demand.

Given the global nature of the problem, it is unsurprising that international law has arisen to stanch the flow through interstate coordination.<sup>6</sup> Such coordination has produced a paradoxical historical moment, which Peter Andreas has dubbed “open markets, closed borders.”<sup>7</sup> That is, at the same time that states have coordinated to create “borderless economies” in legal goods and services, they are coordinating to police their borders against illegal goods and services. Thus, the illegal markets project looks primarily at the legal rules that seek to prohibit these markets and analyzes the causes and effects of prohibitionism. I discuss these aspects further below in Part I.B. (setting out a theory of illegal markets), and Part III.B. (discussing the prohibitionist regime in contemporary international criminal law).

#### *A. Illegal Markets and Legal Pluralism*

This Part will explore the relationship between my illegal markets project and the insights of legal pluralism, focusing in particular on the market for illegal market labor—in other words, for undocumented migrant workers.

There are overlapping regimes that address illegal migration. Despite international law’s pronounced allegiance to free trade and human rights, neither set of principles addresses illegal migration very much, although some instruments do exist. Illegal migrants are a product of globalization driving through and between existing and emerging legal regimes at the national and international levels.

From a welfare perspective, the general effect of the current arrangement of legal regimes—which overlap in some areas but leave gaps in others—is that poor and vulnerable individuals from both sending and receiving countries suffer.<sup>8</sup> Illegal migrants themselves

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6. See generally PETER ANDREAS & ETHAN NADELMANN, *POLICING THE GLOBE: CRIMINALIZATION AND CRIME CONTROL IN INTERNATIONAL RELATIONS* (2006).

7. Peter Andreas, *U.S.–Mexico: Open Markets, Closed Borders*, 103 *FOREIGN POL’Y* 51, 51 (1996).

8. The deviations of fragmentation “should not be understood as legal-technical ‘mistakes.’ They reflect the differing pursuits and preferences [that] actors in a pluralistic (global) society have . . . [i]n conditions of social complexity . . . .” International Law Commission, Report of the Study Group, *Fragmentation of*

are subject to a great deal of abuse. And similarly situated native workers see their bargaining power reduced.

B. *A Theory on Criminal Markets in Liberal States*

International economic law tends to employ traditional trade theory to assist its analysis of the legal rules affecting the cross-border flows of goods and people and the underlying economic characteristics of those flows. Yet without also analyzing illegal markets, international economic law scholars cannot hope to obtain an accurate picture of the economy.

At the center of this dynamic is the power of international markets to erode the nation-state, creating deep tensions between different conceptual fundaments of Western modernity: the nation-state and the market.

We can see this with the ongoing civil and political resistance to imported trade in goods in virtually all societies, regardless of how well established international trade agreements may be. In the United States, the increase in trade in goods and the concomitant decrease in manufacturing has produced a variety of discourses around the need for maintaining the national economy as a basis for national security and, more generally, the American way of life. "Made in the USA" campaigns tap into national identity to mobilize against imported goods. Free trade advocates are at a loss to provide an alternative identity that is as powerful as that of the nation, with the consequence that protectionism often takes the form of nationalism. If the importation of goods presents the nation with a quandary, though, the importation of people threatens national identity even more.

The nationalist resistance to the importation of goods and labor presents the modern nation-state with a deep quandary because the modern Western nation-state is self-consciously *liberal*. Liberalism means (1) an embrace of trade and the market; (2) a tolerance for and

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*International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc. A/CN.4/L.682, para. 16 (April 13, 2006) [hereinafter *Fragmentation*], available at <http://daccess-dds-ny.un.org/doc/UNDOC/LTD/G06/610/77/PDF/G0661077.pdf?OpenElement>. From a functional perspective, one could argue that illegal migrant workforces are allowed in, as their legalization is not politically plausible, so that they get entry and employers (large and small) get access to their labor, and their families and communities get their remittances. Thus, there is certainly a logic to the state of affairs, despite its seeming disarray. I discuss this a bit more in the Conclusion.

openness to diverse identities (as long as they do not threaten this basic tolerance—so tolerance is far from neutrality); and (3) a conception of the individual as fundamentally a right-holder, with all individuals being equal insofar as they hold rights.

The dilemma means that there will be tensions and forces driving a restrictive regulatory impulse. The restrictive regulatory impulse is intended to preserve both the material and ideal status quo. Yet the regulatory impulse at the same time contradicts an important facet of that status quo, which is liberalism.

Out of this tension, a mediating dynamic arises, which reconciles the restrictive impulse with the liberal market-state. The mediating function arises out of the production and applications of *justifications* for regulation in the face of the liberal project. These justifications are where the *public* resides: the domain in which “intervention” into the “private” exchanges of the market (or the family) are justified.

Within liberalism, the default rule is that the state should not intervene. Where the state does “intervene,” there must be a justification. Here intervention is understood not as the difference between regulation and the absence of regulation but rather as the difference between the idealized mode of regulation and some other mode.

That is, maintaining the market requires concerted effort on the part of the state, but that effort is idealized and to a large extent rendered invisible—the market is seen as the natural and normal situation. Restricting the market is a highly visible form of regulation because it departs from this idealized form. Restricting the market thus requires a raft of justifications (while maintaining a liberalized market does not, as it is presumed to be the natural state of affairs).

The level of scrutiny applied to the justification varies between “negative” and “positive” liberalism. Negative liberalism, *a la* Locke, would require a stronger justification than would positive liberalism *a la* Rousseau, where the state is acknowledged to play a much more proactive role in aiding the citizens in their constitution as such.

The stronger justification, however, requires a stronger response. Hence, a strong form of negative liberalism may, paradoxically, tend to produce stronger regulatory responses—because the bar for regulatory intervention is higher. Once it is reached, the case has been made for a much stronger threat to the public good, and thus a

stronger response is required.

Thus, a regime that is self-consciously liberal may tend to be accompanied by regulatory responses of a prohibitionist or abolitionist quality. That is the basic dynamic. But what then shapes the nature of the justifications for regulation—in this case, prohibition through criminalization? There are two varieties of justification. One is the *legitimate-ideological*. The other is the *illegitimate-ideological*.

The *legitimate-ideological* refers to the justifications that are at home within and accepted by liberalism. Essentially, the legitimate-ideological justification within classical liberalism is the “harm” principle: individual activities are permitted so long as they do not cause “harm” to others (J. S. Mill). Where activities are viewed as dangerous to others, they are not permitted. So public health is a thoroughly acceptable basis for regulatory intervention from the classical liberal perspective.

But of course this category only provides general justification. In fact social activity produces many complex effects and negative externalities. By itself it is too broad to specify what kinds of negative externalities will be permitted absolutely, which will be conditionally permitted, and which will be banned. For example, within classical liberal contract law, opportunistic behavior is permitted so long as it does not take the form of behaviors placed within the unacceptable categories of fraud or duress. Within classical liberal property law, questionable individual uses of property are permitted so long as they do not take the form of unacceptable behaviors placed in the category of nuisance.

More generally, certain kinds of marketized activity, such as sales of products or services, are permitted and others are not. Automobiles are permitted even though automobile deaths are inevitable and substantial. The response to the harm takes the form of regulation that conditions the production and use of automobiles to try to reduce the harms—regulations to reduce the likelihood of dangerous defects in the product and to increase the likelihood of safe usage of them (licenses and speed limits). Similarly, the production and provision to others of fattening food is permitted, although disease and death from it is substantial. The response to the harm takes the form of regulation requiring disclosure of nutritional value.

The intensity and likelihood of the harm to others is one central measure of assessment for regulating the market. As per classical liberal utilitarianism, this harm is weighed against the potential benefit of the activity.

Protecting individuals from harming *themselves* is a second mode of justification for regulation. This kind of justification enjoys ideological legitimacy of a more qualified sort. This kind of regulatory intervention does not find its justification in classical “negative” liberalism but rather in more paternalistic approaches that both antedated and succeeded classical liberalism. The extent to which such paternalistic measures are tolerated in part stems from the societal acceptance of alternative forms of liberalism: classical “positive” liberalism and postclassical Fordism.

These justifications are ideologically legitimate because they can be expressed explicitly as the basis for regulatory intervention. However, there are other justifications, which I call *illegitimate-ideological*, which are not expressed. These justifications are “illiberal” because they turn away from the liberal idea of an abstracted, universal self and an abstracted relationship between that self and the state. Instead, they arise from particularistic social identities. Preserving the geographical, cultural, racial, religious, linguistic, and gender identity of the idealized nation-state fuels these justifications. In other words, a threat to the idealized national identity is a form of harm, and regulatory interventions in the market may be motivated by the desire to control that harm.

Thus, where a product or service in the market is associated with a nonideal identity, it may become the focus of regulation. These illegitimate justifications may fuel both the impetus for regulation and the form that regulation takes—regulatory impulses fueled by illegitimate ideological justifications may tend towards prohibition rather than conditional permission.

Prohibitionism has an additional and centrally important quality in that it tends to reinforce the negative aspects of the prohibited activity and thereby strengthens the justifications for prohibition. This feedback loop is created by banishing the activity into the realm of unregulated criminal enterprise. The activity is therefore unmitigated by the kinds of harm-reducing regulations that are administered in a conditional-permission mode, so that the potential harms from the activity itself are at their maximum. Moreover, the harms that might



arise from the activity itself are joined by auxiliary harms that arise from the criminal mode of production, such as violence and extortion. (These dynamics are discussed in more detail in Part V.)

Prohibition has a final quality, which is that it criminalizes the supplying population. Where underlying economic and social dynamics locate production within particular kinds of the population, prohibition will extend the criminal identity of that population. This is a second feedback loop that has to do not with the activity but with the suppliers of the activity. The participation of a given population in the act of supply may arise from an illegitimate ideological justification that perceives that population as a threat to identity; the criminalization of the activity produces criminality in this population which enhances the basis for the justification. (This is discussed more in Part V and Part VI.)

## II. THE DICHOTOMY BETWEEN NORMAL AND ABNORMAL MARKET ACTIVITY IN LIBERAL REGIMES

### A. *The Dichotomy*

We have now established the need for justifications to mediate the tension between the self-consciously liberal state and intervention in the market. We have also established that these justifications explicitly take the ideologically legitimate forms of preventing harm to others, firstly, and preventing harm to oneself, more qualifiedly; but the impetus for and result of these justifications may also be influenced by less often expressed, and ideologically more problematic, concerns related to perceived threats against the identity of the nation-state.

The result of all of this is to create in a liberal regime a dichotomy between “*normal*” *market activity*, which is subject to the “normal” and less visible regulatory mode of supporting the market, and “*abnormal*” *market activity*, which is subject to the abnormal and more visible regulatory mode of prohibition.

Prohibiting the abnormal becomes the site of the expression of both universalized and particularistic public identity as well as the site of the visible, justified exercise of public power. The “state” here is not only the contractarian vision (Locke’s and Mills’) of a protector of civil rights and liberties or the domain of civic participation (Aristotle, Rousseau) but also the site of coercion and violence (Hobbes, Nietzsche, Weber).

“Power” here is coercion, but coercion is partially a product of social consent (Gramsci, Foucault). Institutionally, this means that power is exercised not only by the state “on” society but also by society, and actors and groups within society, “on” the state. “Governance” is the product of these interactions. Hence, regulation is the result of combined activities of actors through the lever of the state, influenced by and influencing the regulatory framework.

The market is the domain of exchange (Smith), an inherently disruptive force (Marx), and the product of regularized and relatively less visible coercion (Hale). The market is also a site for the production of identity through regulation, by regulating in such a way that sets up a dichotomy between normal and abnormal market activities that pay allegiance to the ideal form (Tarullo). Prohibitionist public-health regulations will seek to fend off and close down the markets for illicit products and services, such as illegal drugs, illegal labor, and illegal sex, although the market’s own dynamics do not differentiate between these and others.

Because the dynamics of supply, demand, exchange, and profit themselves potentially apply everywhere, and because they produce results that sometimes resemble but sometimes contradict it, the maintenance of the normal and abnormal market is an ongoing, uneasy affair.<sup>9</sup>

As a *mélange* of theories, this general analytical framework runs the risk of pastiche, which is incoherence. Nevertheless, it seeks to provide a persuasive conceptual account of why liberal states criminalize—or perhaps a better term would be *how*, that is the conceptual nature of the reasons that liberalism gives itself when it turns to prohibition.

#### B. *A Note on Methodology*

This account is a dynamic one in that it envisions regulation as a process of interaction between these actors. It shares this dynamic orientation with “functionalist” and “legal process” accounts of the

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9. Thus, antitrust regulations seek to preserve the “ideal” “normal” market, although the market’s own dynamics will tend to lead it towards monopoly; antidumping trade regulations seek to preserve the “ideal” “normal” market, although the market’s own dynamics will tend to lead it towards “dumping.” Daniel K. Tarullo, *Beyond Normalcy in the Regulation of International Trade*, 100 HARV. L. REV. 546, 549 (1987).

mid-twentieth century and with “governance” theory of the current moment.

The approach to governance employed here is, however, a critical one. The critique is animated by the following perspectives: (1) a legal realist approach: that is, a focus on the background conditions and distributional consequences of the framework; (2) a poststructuralist approach: that is, a focus on the role of ideals and discourses in addition to material conditions and institutions; and (3) a progressive approach: that is, a desire to identify and resolve those dynamics that structurally subordinate individuals and groups.

The analytical account is not only descriptive but also critical along these lines, in that it attempts to expose within the contemporary framework: (1) the ways in which the legal rules ignore or inadequately take into account the background conditions and distributional consequences of their operation; and (2) the ways in which the legal rules ignore or inadequately take into account their origin within and contribution to particularistic ideals and discourses the ways in which the legal rules ignore or inadequately take into account their structural subordination of individuals and groups.

The remainder of this Paper applies the foregoing analytic to the issue of undocumented workers as a case study of fragmented legal systems coexisting “in the same social field.”<sup>10</sup>

### III. PLURAL LEGALITY IN THE SOCIAL FIELD OF UNAUTHORIZED MIGRANT WORKERS

The array of international treaty systems actually or potentially affecting undocumented migrant workers fits Merry’s definition of legal pluralism, in which one finds multiple legal orders not belonging to the same system but addressing the same social reality.<sup>11</sup>

#### A. *The “Liberal Egalitarian” Regimes of Trade and Human Rights*

##### 1. Trade

The multilateral trading regime is anchored by the World Trade Organization (WTO), the 1995 successor to the General Agreement

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10. Merry, *supra* note 1, at 870.

11. In this version of the Paper, I do not attempt to incorporate an analysis of regional treaties; this is the basis of ongoing research that will hopefully bear fruit in the next version.

on Tariffs and Trade (GATT). For most of its history, the trade regime dealt only with trade in goods, but with its expansion into the WTO included new rules addressing cross-border transactions involving flows of people.

The central principle of the World Trade Organization is nondiscrimination, as embodied, *inter alia*, in the doctrine of “national treatment,” which holds that national origin should not be a basis for discrimination in market access. At the same time, of course, there are many exceptions to this principle, and those exceptions can largely be understood as the product of political economy—they tend to represent areas in which government representatives determine that some subset of interest groups influencing state behavior wishes to continue policies of discrimination on the basis of national origin.

In the trade regime’s lingo, migrant labor is a sub-category of “trade in services” and so falls within the scope of the General Agreement on Trade in Services (GATS) established in 1995. Since the provision of services need not entail the movement of an actual person across a national border, not all categories, or “Modes,” of GATS rules are relevant to our topic. The Mode that is most relevant is “Mode 4,” temporary movement of natural persons.<sup>12</sup>

The GATS is very limited in its potential to help undocumented workers. First, GATS Mode 4 does not address manufacturing or agriculture, excluding the very sectors which most commonly feature undocumented workers.<sup>13</sup> Second, this exclusion within Mode 4 is accompanied by a *de facto* focus of the GATS, in its entire orientation, on high-skilled service sectors such as accounting and financial services. Third, the Annex to the GATS covering Movement of Natural Persons (Annex) does not provide any authorization for a worker to enter a country<sup>14</sup> but stipulates only

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12. “Trade in services” is defined as “the supply of a service by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.” General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex on Movement of Natural Persons Supplying Services Under the Agreement, 1869 U.N.T.S. 183, 185, 33 I.L.M. 1167, 1187 (1994) [hereinafter GATS].

13. Org. for Econ. Co-Operation and Dev., *Service Providers on the Move: A Closer Look at Labor Mobility and the GATS*, TD/TC/WP(2001)26/FINAL (Feb. 20, 2002) [hereinafter OECD 2002].

14. GATS, *supra* note 12, Annex on Movement of Natural Persons Supplying Services Under the Agreement [Annex on Movement of Natural Persons], para. 2,

certain constraints (such as nondiscrimination and national treatment) once that authorized worker does enter.

WTO members are currently engaged in the “Doha” Round of Negotiations, launched by the 2001 WTO Ministerial Conference and accompanying Ministerial Declaration (the Doha Declaration) setting forth goals for negotiations. For the first time ever, the WTO is fielding serious proposals by member states to include negotiations on low-skilled labor migration.

The Doha Declaration states that “negotiations on trade in services shall be conducted with a view to promoting the economic growth of all trading partners and the development of developing and least-developed countries.”<sup>15</sup> The negotiations on trade in services are expected to form an important part of the results for the Doha round. The Declaration calls for a focus on rules governing movement of natural persons and the effect of those rules on prospects for development.

Developing-country members of the WTO are increasingly concerned with addressing low-skilled labor migration head on, particularly since many are significant exporters of such labor. Several countries have offered proposals that would elaborate rules on the movement of natural persons, and some of these proposals directly link movement of natural persons with development.<sup>16</sup> Perhaps the boldest call, however, has come from the United Nations Development Programme, which has urged the negotiation of WTO

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reprinted in 33 I.L.M. 1127 (“[T]he Agreement shall not apply to measures affecting natural persons seeking access to the employment market of a Member, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis.”).

15. World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002).

16. See Communication from India, *Proposed Liberalization of Movement of Professionals under General Agreement on Trade in Services (GATS)*, S/CSS/W/12 (Nov. 24, 2000); Communication from United States, *Movement of Natural Persons*, S/CSS/W/29 (Dec. 18 2000); Communication from Japan, *Movement of Natural Persons*, S/CSS/W/42/Suppl.2 (July 6, 2001); Communication from EC, *GATS 2000: Temporary Movement of Service Suppliers*, S/CSS/W/45 (March 14, 2001); Communication from Canada, *Initial Negotiating Proposal on Temporary Movement of Natural Persons Supplying Services under the GATS (Mode 4)*, S/CSS/W/48, (March 14, 2001); Communication from Colombia, *Proposal for Negotiations on the Provision of Services Through Movement of Natural Persons*, S/CSS/W/97 (July 9, 2001).

rules liberalizing constraints on low-skilled labor migration.<sup>17</sup>

There have been some negotiations regarding the creation of a basis for easier authorization of workers who fall into the GATS categories. The so-called GATS visa has been promoted by the Indian government as well as U.S. and European businesses.<sup>18</sup> This would effectively amend the Annex. However, even were the GATS visa to be negotiated, it would not be likely to aid the most vulnerable populations because of the limitations stated above. GATS Mode 4 has been characterized by low levels of participation by WTO Members, so it is unlikely to expand to transcend the limitations stated above.<sup>19</sup>

## 2. Human Rights

If international trade law leaves undocumented migrant workers without recourse, what does international human rights law offer? Does the human rights framework provide some basis on which illegal migrants, by virtue of their humanity, might enjoy rights?

The International Covenant on Civil and Political Rights (ICCPR)<sup>20</sup> defines the principle of nondiscrimination in this way:

Each State Party undertakes to respect and to ensure to *all individuals within its territory* and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or *other status*.<sup>21</sup>

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17. UNITED NATIONS DEVELOPMENT PROGRAMME & KAMAL MOHOTRA, MAKING GLOBAL TRADE WORK FOR PEOPLE 274–75 (2003).

18. Richard Self & B. K. Zutshi, *Temporary Entry of Natural Persons as Service Providers: Issues and Challenges in Further Liberalization Under the Current GATS Negotiations*, at 25 (2002), [http://www.wto.org/english/tratop\\_e/serv\\_e/symp\\_apr\\_02\\_zutshi\\_self\\_e.doc](http://www.wto.org/english/tratop_e/serv_e/symp_apr_02_zutshi_self_e.doc).

19. OECD 2002, *supra* note 13, at 6. Although regional systems are not addressed in this Paper, many of them—with the exception of the EU policy of free movement of persons with *EU citizenship*—have a similar effect. The NAFTA streamlines some entry requirements for skilled professionals. South-South regional agreements, such as the Greater Arab Free Trade Agreement and the African Economic Community, do not mention services or migrant labor at all.

20. International Covenant on Civil and Political Rights, Dec. 16, 1966, T.I.A.S. No. 14668, 999 U.N.T.S. 171 [hereinafter ICCPR].

21. *Id.* art. 2(1). Moreover, the ICCPR grants an effective remedy for “any person whose rights and freedoms as herein recognized are violated. *Id.* art. 2(2).

The italicized language suggests that migrant workers, even if undocumented, should be able to exercise rights equal to any other person in a State Party's territory.

A General Comment on the Position of Aliens Under the Covenant seeks to draw attention to this language.<sup>22</sup> The Comment states that:

[T]he general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. . . . However, the Committee's experience in examining reports shows that in a number of countries . . . rights that aliens should enjoy under the Covenant are denied to them or are subject to limitations that cannot always be justified under the Covenant.<sup>23</sup>

Is such commentary intended to establish a right of entry for migrant workers? The Committee hastened to qualify its interpretation by stating that the treaty "does not recognize the right of aliens to *enter* or to *reside* in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory."<sup>24</sup>

At the same time, the Committee indicated "in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise."<sup>25</sup> What the precise nature of such circumstances would be, however, remained unspecified.

Thus, the overarching nature of the nondiscrimination principle in the ICCPR seems to give the state the right to say who can come in and who has to go, but once the alien is within, the territory cannot discriminate. Although the question of lawful status is not explicitly mentioned here, one can surmise that its omission is intentional.

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22. Office of the High Commissioner for Human Rights, *General Comment No. 15: The Position of Aliens Under the Covenant*, para. 1 (November 4, 1986) ("Reports from States parties have often failed to take into account that each State party must ensure the rights in the Covenant to 'all individuals within its territory and subject to its jurisdiction' (art. 2, para. 1). In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness.").

23. *Id.* para. 2.

24. *Id.* para 5. (emphasis added).

25. *Id.*

This inference becomes stronger when one considers another part of the General Comment which states that, “[o]nce an alien is lawfully within a territory, his freedom of movement within the territory and his right to leave that territory may only be restricted in accordance with article 12(3).”<sup>26</sup> Since this is the only place where lawful status is explicitly mentioned, one can be even more confident in interpreting the lack of explicit mention as intentional. This would support the application of the nondiscrimination principle regardless of lawful status. The familiar canon of legal interpretation, *exclusio unio inclusio alterius*, can be applied to conclude that the fact that lawful status is mentioned here but not elsewhere suggests that, with respect to the other principles, lawful status is not a basis for distinction.

What about specific rights of particular interest to migrant workers, such as the right to organize? The ICCPR establishes that “[e]veryone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of interests.”<sup>27</sup> At the same time, this right is subject to “restrictions . . . prescribed by law and necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.”<sup>28</sup> Whether such restrictions would include those distinguishing documented from undocumented workers, notwithstanding the General Comment discussed above, has not been explicitly addressed.

Whether established international human rights law confers such rights as nondiscrimination and freedom of association on migrant workers, and on what basis, is a question that also requires examination of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (the Migrant Workers Convention).<sup>29</sup> The Convention entered into force in December 2002 after receiving the last ratification necessary for its entry into force thirteen years after its initial adoption as a Resolution of the United Nations General Assembly in 1990.

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26. *Id.* para. 8.

27. ICCPR, *supra* note 20, art. 22(1).

28. *Id.* art. 22(2).

29. International Covenant on the Protection of the Rights of All Migrant Workers and Members of Their Families, Dec. 18, 1990, 2220 U.N.T.S. 93.



Article 1 of the Migrant Workers Convention provides that the right against discrimination “shall apply during the entire migration process of migrant workers and their families, which comprises preparation for migration, departure, transit and the entire period of stay and remunerated activity . . . as well as return . . . .”<sup>30</sup>

Unlike the trade regime, this rule of nondiscrimination is not limited to particular sectors listed by state parties but rather applies to any person “who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.”<sup>31</sup> Moreover, although the Convention distinguishes between “documented” and “non-documented” workers elsewhere, such distinction is not present either in this article, its nondiscrimination article,<sup>32</sup> or its article establishing the right to form and join trade unions.<sup>33</sup> The inference that these principles should not turn on document status is particularly strengthened by the fact that the Convention contains a separate section on the rights of “documented” migrant workers and their families.<sup>34</sup>

Thus, international human rights law could be argued to extend to illegal migrant workers principles perceived as foundational to the human rights system. As such, international human rights law extends liberal egalitarianism further than international trade law, although how far depends on interpretive questions that have yet to be resolved. At the same time, multilateral human rights enforcement is ineffective in terms of the provision of recourse for individual claimants.<sup>35</sup>

Predating human rights treaties are the treaties of the International Labor Organization, which include the Convention on the Freedom of Association and Protection of the Right to Organize<sup>36</sup> and the

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30. *Id.* art. 1(2).

31. *Id.* art. 2(1). This includes “frontier worker,” “seasonal worker,” “seafarer,” “worker in an offshore installation,” “itinerant worker,” “project-tied worker,” “specified employment worker,” and “self-employed worker.” *Id.* art. 2(2).

32. *Id.* art. 7.

33. *Id.* art. 26.

34. *Id.* arts. 36–56.

35. Regional human rights systems may harbor more potential. *See* Connie de la Vega & Conchita Lozano-Batista, *Advocates Should Use Applicable International Standards to Address Violations of Undocumented Migrant Workers’ Rights in the United States*, 3 HASTINGS RACE & POVERTY L. J. 35 (2005) (describing the Inter-American human rights system).

36. International Labour Organization, *Freedom of Association and Protection*

Convention on the Right to Organize and Collective Bargaining.<sup>37</sup> Article 2 of the Freedom of Association Convention provides that the Convention applies, on its own terms, “without distinction whatsoever”; and Article 1 of the Collective Bargaining Convention requires “adequate protection against acts of anti-union discrimination.” Thus, international labor law would also appear to be a basis for extending basic civil and political individual rights to migrant workers. Although the International Labour Organization (the ILO) does have a Committee which undertakes fact-finding and reporting, it too does little in the way of enforcement. (The ILO process will be taken up again in Part III, below.)

#### B. *The Prohibitionist Regime: Criminal Laws*

In 2000, the international criminal law against illegal markets expanded dramatically with the establishment and rapid entry into force of a new complex of multilateral agreements negotiated at Palermo under the auspices of the Vienna-based UN Office on Drugs and Crime Control: the Convention Against Transnational Organized Crime (the Organized Crime Convention)<sup>38</sup> and two Protocols, the Migrant Smuggling Protocol<sup>39</sup> and the Trafficking in Persons Protocol<sup>40</sup> (collectively, the Crime Conventions). Together with the already-existing Drug Convention,<sup>41</sup> the overall goal is to harmonize states’ prohibition and prosecution of illicit market transactions.

These multilateral policing efforts contain both substantive and institutional dimensions. Substantively, the agreements establish harmonized definitions of criminal offenses relating to “core” illicit

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*of the Right to Organize Convention*, Gen. Conf. No. 87 (July 9, 1948).

37. International Labour Organization, *Convention Concerning the Application of the Principles of the Right to Organize and to Bargain Collectively*, Gen. Conf. No. 98 (June 8, 1949).

38. United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, S. TREATY DOC. NO. 108-16, 2225 U.N.T.S. 209 [hereinafter *Organized Crime Convention*].

39. U.N. Ad Hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime, Protocol Against the Smuggling by Land, Sea and Air, supplementing the UN Convention Against Transnational Organized Crime, Annex III; UN Doc. A/55/383 (2000) [hereinafter *Migrant Smuggling Protocol*].

40. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Nov. 15, 2000, S. TREATY DOC. NO. 108-16, 2237 U.N.T.S. 319 [hereinafter *Trafficking Protocol*].

41. Convention Against Illicit Traffic in Narcotics Drugs and Psychotropic Substances, Dec. 20, 1988, SEN. TREATY DOC. NO. 101-4, 1582 U.N.T.S. 165 [hereinafter *Drug Convention*].

markets. The Drug Convention requires member states to criminalize manufacturing, sale, transport, and possession of narcotics as well as related profit;<sup>42</sup> the Organized Crime Convention requires member states to criminalize participation in a criminal group, money laundering, corruption of public officials, and obstruction of justice;<sup>43</sup> the Migrant Smuggling Protocol requires member states to criminalize the transport of migrants without valid travel documentation and related uses of fraudulent travel documents;<sup>44</sup> and the Trafficking Protocol requires member states to criminalize the “trafficking of persons” as defined in the Protocol.<sup>45</sup>

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42. See *id.* art. 3 (establishing as a criminal offense the “production, manufacture, . . . offering for sale, distribution, sale, delivery . . . , . . . transport, importation or exportation of any narcotic drug or any psychotropic substance”; the “conversion or transfer” or the “acquisition, possession or use” of property, knowing that it is derived; and aiding or abetting in any of the foregoing).

43. Organized Crime Convention, *supra* note 38, art. 5 (establishing as an offense the act of “[a]greeing with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organized criminal group”; the “action” requirement is a consequence of the nonrecognition of the crime of conspiracy in the civil law system); *Id.* art. 6 (establishing as an offense the “conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property”); *Id.* art. 8 (establishing as an offense the “promise, offering or giving to a public official” or “solicitation or acceptance by a public official,” “directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties”); *Id.* art. 23 (establishing as a criminal offense, when committed intentionally, “the use of physical force, threats or intimidation or the . . . offering . . . of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence” or otherwise “to interfere with the exercise of official duties by a justice or law enforcement official” in a proceeding in relation to the commission of offences covered by this Convention”).

44. Migrant Smuggling Protocol, *supra* note 39, art. 6 (establishing as a criminal offense, “when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit,” smuggling of migrants, or producing, providing, procuring or possessing a fraudulent travel or identity document when such acts “committed for the purpose of enabling the smuggling of migrants”).

45. Trafficking Protocol, *supra* note 40, art. 5. The Trafficking Protocol requires criminalization of trafficking, defined as: “the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the

Institutionally, the agreements give fairly detailed guidelines<sup>46</sup> for the coordination of law enforcement among member states in combating these criminal offenses.<sup>47</sup> If a state party refuses the

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prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.” *Id.* art. 3. The Trafficking Protocol specifies that “the consent of a victim of trafficking in persons to the intended exploitation [as defined in the Protocol] shall be irrelevant where any of the means set forth in [the Protocol] have been used.” *Id.* art. 3(b).

The definition of trafficking in the Protocol has been very controversial, particularly within communities of feminist theorists and women’s rights advocates. *See generally* Janet Halley, Prabha Kotiswaran, Hila Shamir & Chantal Thomas, *From the International to the Local in Feminist Legal Responses: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 336 (2006).

46. There is also a more general obligation to cooperate. *See* Organized Crime Convention, *supra* note 38, art. 27 (“States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems,” especially in aid of conducting inquiries regarding identity of persons or property related to crimes; and general exchange of information.). The Drug and Crime Conventions, for example, have established progressively more extensive obligations relating to extradition. For an account of this progression towards “thick” institutional obligations, see Chantal Thomas, *Disciplining Globalization: International Law, Illegal Trade, and the Case of Narcotics*, 24 MICH. J. INT’L L. 549, 570–71 (2003) (internal citations omitted) (“The 1961 Convention said relatively little about the institutional mechanics of punishing illicit trade, but it did establish basic standards for extradition of offenders. . . . The 2000 Convention expanded the bases for extradition to include not only those acts defined as offenses under the treaty, but also any other act involving an ‘organized criminal group’ that constituted an offense in both countries. The 1988 and 2000 Conventions developed additional mechanisms to increase efficacy in criminal enforcement. Both conventions progressively expanded subject matter jurisdiction. They also multiplied the bases for confiscation of narcotics materials and instruments. Each convention also contributed unique techniques to the enforcement arsenal. The 1988 Convention allowed for and encouraged eradication of illicit crops. The 2000 [Organized Crime] Convention allows Member States to use ‘special investigative techniques, such as electronic or other forms of surveillance and undercover operations’ to aid enforcement. The 2000 Convention also requires members to ‘institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions . . . in order to deter and detect all forms of money laundering.”).

47. The conventions also require member states to meet some institutionalization requirements vis-à-vis purely domestic enforcement, but these appear to be designed to establish a baseline conducive to intergovernmental cooperation with law enforcement authorities from other states. For example, a state party to the Organized Crime Convention must ensure a minimum domestic criminal law environment by establishing formal sanctions for the Convention’s defined criminal offenses. *See* Organized Crime Convention, *supra* note 38, art. 11 (Members “must establish sanctions to punish conspiracy/involvement, laundering, corruption and obstruction of justice”; “[e]ach State Party shall make the

request of another state party to extradite an individual, it becomes subject to an obligation to prosecute that individual internally.<sup>48</sup> There are also extensive provisions regarding “mutual legal assistance” during the stages of criminal investigation that antecede formal indictment and extradition.<sup>49</sup> In addition, the conventions establish bases for coordinating the policing of borders against illegal migrants<sup>50</sup> by allowing states to extend immigration-related investigations extraterritorially into commercial carriers under the control or auspices of other state parties.<sup>51</sup> Both “smuggled migrants”

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commission of an offence [of organized crime, money laundering, corruption, and obstruction of justice] . . . liable to sanctions that take into account the gravity of that offence.”) Further guidance related to specific penalties and techniques is hortatory rather than mandatory. *Id.* art. 12 (noting on confiscation that “States Parties shall adopt, to the greatest extent possible within their domestic legal systems, such measures as may be necessary to enable confiscation”); *id.* art. 20 (noting on surveillance that “[i]f permitted by the basic principles of its domestic legal system, each State Party shall, within its possibilities and under the conditions prescribed by its domestic law, take the necessary measures to allow for the appropriate use of controlled delivery and, where it deems appropriate, for the use of other special investigative techniques, such as electronic or other forms of surveillance and undercover operations”); *id.* art. 28 (noting on cooperation with law enforcement that “[e]ach State Party shall take appropriate measures to encourage persons who participate or who have participated in organized criminal groups: (a) To supply information useful to competent authorities for investigative and evidentiary purposes . . .”).

Note that States Parties must make criminal such offenses not only when they involve a transnational component but also even if they are wholly domestic. *Id.* art. 34 (“The offences [on conspiracy or other ‘participation in an organized criminal group,’ laundering, corruption, and obstruction of justice] . . . shall be established in the domestic law of each State Party independently of the transnational nature” of the activity.).

48. *See id.* art. 16(10) (“A State Party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence to which this article applies solely on the ground that he or she is one of its nationals, shall, at the request of the State Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution.”).

49. *See id.* art. 18 (defining mutual legal assistance as taking evidence or statements from persons; effecting service of judicial documents; executing searches and seizures, and freezing; examining objects and sites; and providing information, evidentiary items and expert evaluations).

50. *See* Migrant Smuggling Protocol, *supra* note 39, art. 11(1) (“Without prejudice to international commitments in relation to the free movement of people, States Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect the smuggling of migrants.”).

51. *Id.* art. 11. *See also* Trafficking Protocol, *supra* note 40, art. 11 (extending obligation to strengthen border controls to “commercial carriers” by requiring “commercial carriers . . . to ascertain that all passengers are in possession of the travel documents required for entry into the receiving State”); *id.* art. 8 (encouragement of cooperation with investigation of sea vessels).

and “trafficked persons”<sup>52</sup> can be returned home by the “receiving” state party, and both must be accepted by the “sending” state party.<sup>53</sup>

### C. *Comparison with Trade and Human Rights Regimes*

The international criminal law regime appears quite robust when compared with its rather feeble counterparts in trade and human rights. Despite the relative strength of the WTO generally, the existing subdivision governing trade in services is much less effectual. This is because, as indicated above, in services the basic WTO disciplines of nondiscrimination and national treatment apply only to those sectors that are voluntarily made subject to them—this contrasts with the rules governing trade in goods or intellectual property, where these principles automatically apply.<sup>54</sup> And within the relatively weak division of trade in services, those provisions governing migrant (temporary) labor are the weakest and most qualified. Substantively, the rules formally exclude unauthorized labor from their purview, as well as those sectors in which undocumented migrant workers are likely to work. The practical effect of the trade regime is to confer the privileges of liberalization only to high-skilled workers.

The human rights regime as it applies to undocumented migrant workers would appear to offer, in terms of its substantive content, some form of protection to unauthorized migrants, and in that sense it is stronger than the trade rules. However, the Migrant Workers Convention is hampered by a lack of signatories. The ICCPR, although it has more signatories and so could presumably be used to

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52. The conceptual distinction between “smuggled migrants” and “trafficked persons” rests on voluntariness: the smuggled migrant is said to have consented to being transported illegally, whereas the trafficked person has encountered fraud, force, or some other mode of coercion. In practice, this distinction can be very hard to maintain. Conceptually, this distinction reflects a deep ambivalence in socio-legal commitments to contract and market as regulatory tools.

53. See, e.g., Migrant Smuggling Protocol, *supra* note 39, art. 18(1) (“Each State Party agrees to facilitate and accept, without undue or unreasonable delay, the return of a person who has been the object of conduct set forth in article 6 of this Protocol and who is its national or who has the right of permanent residence in its territory at the time of return.”); Trafficking Protocol, *supra* note 40, art. 8(1) (“The State Party of which a victim of trafficking in persons is a national or in which the person had the right of permanent residence at the time of entry into the territory of the receiving State Party shall facilitate and accept, with due regard for the safety of that person, the return of that person without undue or unreasonable delay.”).

54. The Doha round includes an effort to expand the commitments under trade in services; since it is subject to controversy, it is uncertain how this will turn out.

reinforce the principle of protecting the human rights of undocumented migrant workers, is limited in its ability to offer any recourse to right-holders. In addition, signatories like the United States would argue, albeit not without controversy, that their reservations to the treaty restrict potential right-holders to that recourse offered under domestic constitutional law.<sup>55</sup> That recourse, as shall be discussed below, has been spotty and seems to be shrinking over time.

The international criminal law treaties have many more participating members than the Migrant Workers Convention or the GATS.<sup>56</sup> Moreover, unlike either of these two conventions, the international criminal law treaties contain a great deal of *administrative* obligations—specifications as to how state parties should go about implementing the treaty's provisions. The apparatus established by these conventions is thus much broader in its purview and authority.

In terms of enforcement, the international criminal law treaties do not feature the type of dispute settlement mechanism found in the WTO. In that sense, they could be argued to suffer from the same form of institutional frailty that typifies most public international law instruments. At the same time, however, the multilateral agreements are supplemented by a wide variety of regional, bilateral, and unilateral practices, typically spearheaded by “receiving” countries. The United States, for example, provides extensive aid, funding, and military training to Latin America to combat the drug trade.<sup>57</sup> The

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55. See 138 Cong. Rec. S4, 781-01 (daily ed. Apr. 2, 1992) (setting forth Senate reservations to the ICCPR). For challenges to the validity of reservations, see generally Lori F. Damrosch, *The Role of the United States Senate Concerning “Self-Executing” and “Non-Self-Executing” Treaties*, 67 CHI.-KENT L. REV. 515 (1991); David Weissbrodt, *The United States Ratification of Human Rights Covenants*, 63 MINN. L. REV. 35 (1978).

56. Although all WTO Members are formally signatories to the GATS, the fact that GATS principles apply only to those sectors for which members have actively made concessions, and the fact that only a minority of members have made such concessions, effectively means the level of participation is low. See OECD 2002, *supra* note 13, at 30 (stating that the “the ratio of full liberalization in Mode 4 market access ranges from 0 to 4%, compared with 18–59% in Mode 1 (cross-border, such as e-commerce), 24–69% in Mode 2 (consumption abroad, such as foreign outpatients), and 0–31% in Mode 3 (commercial presence, such as foreign subsidiaries”).

57. Examples include Plan Colombia, providing U.S. assistance to Colombia, and the Andean Pact, providing trade and aid programs to Colombia, Bolivia, Ecuador, and Peru. See Supplemental Agreement for Cooperation and Technical

European Union's Department of Justice and Home Affairs maintains extensive working relationships with Europol, the Task Force of EU Police Chiefs, the European Police College (CEPOL), Interpol, and the Council of Europe.<sup>58</sup>

Thus, as a normative matter, the international criminal law treaties seem to be operating to justify and reinforce efforts by Northern "receiving" states to strengthen not only their internal prosecutions of illegal transactions but also their pursuit of strong cooperative mechanisms with Southern "supplier" states. The most salient example, but far from the only one, is the U.S. Department of State's system of categorizing governments according to the efforts they have made to combat trafficking in persons. Countries are placed on one of four "tiers" according to the level of effort they have made in this vein. The Department of State is authorized to withhold foreign aid from those recipient governments that have not made sufficient efforts. The kinds of efforts that are viewed most favorably are those that strengthen the police and prosecutorial functions of the government. This watch list has proven enormously successful; so much so that even governments that neither receive nor require U.S. foreign aid, such as Japan, have hastened to change their practices to counter the reputational cost of an adverse assessment.<sup>59</sup>

The Trafficking Protocol, of course, has at its center the goal of reducing the suffering of victims of "modern-day slavery." To that end, the Protocol does contain language promoting the protection of

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Assistance in Defense and Security Between the Governments of the United States of America and the Republic of Columbia art. 3(1), Mar. 11, 2009, Temp. State Dept. No. 09-200, Hein's No. KAV 8780, *available at* <http://www.state.gov/documents/organization/131654.pdf>; Letter to Congressional Leaders Transmitting a Report Concerning a Review of the Performance of Bolivia and Ecuador as Set Forth in the Andean Trade Preference Act, Daily Comp. Pres. Doc., 2009 DCPD No. 00525 (June 30, 2009), *available at* [http://www.politico.com/static/PPM136\\_091112\\_bho\\_letter.html](http://www.politico.com/static/PPM136_091112_bho_letter.html).

58. These activities are coordinated through Directorate D of the Directorate-General for Justice, Freedom and Security. The mandate for the EU's regional and supranational initiatives arises from the objective that the European Union *be an* "area of freedom, security and justice." Consolidated Version of the Treaty Establishing the European Economic Community art. 1(3), Oct. 2, 1997, 1997 O.J. (C 340) 3 (Treaty of Amsterdam). *See also* Treaty Establishing the European Economic Community arts. 17–22, 39–47, Mar. 25, 1957, 298 U.N.T.S. 4 (Treaty of Rome).

59. *See generally* Janie Chuang, *The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking*, 27 MICH. J. INT'L L. 437 (2006).



human rights of trafficking victims. However, whereas the Protocol's language relating to criminalization and repatriation establishes mandatory obligations, the provisions relating to assistance of victims and human rights protection are aspirational.<sup>60</sup>

Again, to look at the actions of the U.S. government, this apparent emphasis on criminal prosecution over victim assistance is reflected. For example, the U.S. anti-trafficking statute enacted contemporaneously with the Protocol provides that persons who have been trafficked into the United States might be able to benefit from a special visa created for them (the T visa), which would allow them to avoid returning to the presumably dangerous circumstances that caused them to be trafficked in the first place. However, despite the Department of State's estimate that up to twenty to fifty thousand people are trafficked into the U.S. annually, the statute allows for only five thousand of these visas to be conferred annually. Of the allowed visas, only a fraction are actually issued.<sup>61</sup> Finally, even in this victim-assistance mode, criminal prosecution is paramount: the visa is conditional upon the victim's certified cooperation with police authorities—activity that could arguably increase the vulnerability of the victim, or the victim's family or loved ones, to retaliation by the traffickers.<sup>62</sup>

Finally, although the scope of "trafficking in persons" definitionally includes a wide range of forced labor situations, in practice the discourse around trafficking has focused on combating and abolishing prostitution.<sup>63</sup> In the U.S. context, the Bush Administration explicitly included the criminalization of prostitution among its conditions for foreign assistance. Efforts by legal services and NGOs in the U.S. seeking to protect migrant workers in, for

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60. Compare Trafficking Protocol, *supra* note 40, art. 5 (on criminalization: states "shall . . . establish . . . criminal offenses."), art. 8 (on repatriation: states "shall facilitate and accept . . . the return of [a victim of trafficking]."), with *id.* art. 6 (on the establishment of social services programs: states "shall consider implementing measures to provide for the physical, psychological and social recovery of victims."), art. 7 (on the status of victims: states "shall consider adopting . . . measures that permit victims of trafficking . . . to remain in . . . territory.").

61. See, e.g., U.S. STATE DEP'T., ANNUAL REPORT ON THE TRAFFICKING IN PERSONS (2004).

62. See generally Thomas et al., *From the International to the Local in Feminist Legal Responses*, *supra* note 2.

63. See *supra*, note 45.

example, agricultural or domestic labor have so far been unable to tap into the protections offered by the anti-trafficking statute.<sup>64</sup>

#### IV. THE SYMBOLIC AND NORMATIVE ORDERING EFFECTS OF INTERNATIONAL CRIMINAL LAW

Beyond its specific institutional authoritativeness, international criminal law against illegal markets, by criminalizing the suppliers, has the effect of throwing a shadow of suspicion over entire regions of the world that are viewed thereafter as suppliers of criminality.

The atmosphere of fear and paranoia in developed countries against those lawless wilds outside their borders both enables and is enhanced by the expansion of the prohibitionist regime. Certainly, in a post-9/11 world in which major political powers have declared an ongoing state of heightened alert, the social atmosphere may be one in which popular concerns in developed countries around increased economic instability in the globalization era very easily dovetail with increases in perceived criminal dangers beyond borders.

Thus, globalization seems to be twinned with increasing border paranoia. That such sentiments concretely affect international affairs was reflected, for example, in remarks given by Jan Eliasson, the President of the Sixtieth Session of the United Nations General Assembly, calling for “a strong effort for international openness” despite the perceived dangers of globalization:

The free movement of people, ideas—and merchandise, of course—is important and has contributed enormously to the positive change in the recent decade. But if that outside world also, to many, is seen as a *threat*, the political forces are

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64. For example, legal services organizations in Central Texas were attempting to get T visas and other protections for undocumented Mexican workers who had been recruited to work in construction and hotels by employers who then had not paid them, knowing that the workers would likely be unable to seek any recourse against them. See, e.g., Thomas et al., *From the International to the Local in Feminist Legal Responses*, *supra* note 2, at 390–91 (“These advocates describe such practices as enslavement because workers are not compensated for their labor. Moreover, employers take advantage of the vulnerability these workers suffer as a result of their undocumented status. So far, under State Department rules, if the employer simply chooses not to pay workers without threatening to turn them into immigration authorities, he is not considered to be “trafficking.”). Since such labor involved deception and was unpaid, these lawyers thought the workers could fairly be described to be victims of trafficking. These efforts have so far been unsuccessful.

fishing in murky waters and looking at *migration and crime and so forth coming from that dangerous outside*, then we are in trouble.<sup>65</sup>

Some commentators have argued that moral panics, border paranoia, and other political anxieties that fuel national and international prohibitionist efforts stem from unconscious, deeply rooted, symbolic dynamics tying national identity to the physical body. Territorial integrity is associated with bodily integrity in this symbolic order. Openness to and presence of aliens contaminates the national body.<sup>66</sup>

This discursive framework has perhaps most forcefully been articulated as “biopower.” According to this concept, the symbology of the state as a body fuels “the explosion of numerous and diverse techniques for achieving the subjugations of bodies and the control of populations.”<sup>67</sup> In this way, the crime conventions’ harmonization and coordination of criminal enforcement, extension of techniques such

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65. H.E. Jan Eliasson, Speech to Carnegie Council as Part of “A Fairer Globalization” Series, The Progress of UN Reform (June 7, 2006) (transcript on file with the Maryland Journal of International Law) (emphasis added).

66. For an exposition on this social dynamic in the U.S. in particular and especially during the period in which U.S. expansion overseas fueled anxiety about its cultural and political integrity, see generally AMY KAPLAN, *THE ANARCHY OF EMPIRE IN THE MAKING OF U.S. CULTURE* (2005). One of Kaplan’s case studies is *Downes v. Bidwell*, the Supreme Court decision where, in a concurring opinion, three justices described Puerto Rico as “foreign in a domestic sense” under U.S. law, so that the territory neither could demand sovereignty nor was subject to federal laws that were not expressly extended to it by the U.S. Congress. See *Downes v. Bidwell*, 182 U.S. 244, 320 (1901) (White, J., Shiras, J. & McKenna, J., concurring). For a critique of this position, see *id.* at 384 (Harlan, J., dissenting) (emphasis added) (“[T]he contention seems to be that, if an organized and settled province of another sovereignty is acquired by the United States, Congress has the power to keep it, like a disembodied shade, in an intermediate state of ambiguous existence for an indefinite period. . . . *Great stress is thrown upon the word ‘incorporation,’ as if possessed of some occult meaning.*”). Though it did not prevail in the particular case, the dissent’s language in the *Wong Kim Ark* case must be read to be indicative of some goodly proportion of public sentiment: “There should be some honor and dignity in American citizenship that would be sacred from the foul and corrupting taint of a debased alienage.” *United States v. Wong Kim Ark*, 169 U.S. 649, 675 (1898) (Fuller, J. & Harlan, J., dissenting), cited in Sanford Levinson, *Installing the Insular Cases into the Canon of Constitutional Law*, in *FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION* 121 (Christina D. Burnett & Burke Marshall eds., 2001).

67. 1 MICHEL FOUCAULT, *HISTORY OF SEXUALITY* 140 (1992). See also *GLOBALIZATION UNDER CONSTRUCTION: GOVERNMENTALITY, LAW AND IDENTITY* (Richard Warren Perry & Bill Maurer eds., 2003).

as extradition and information-sharing among states, and assurance of the repatriation of offending migrant bodies can all be seen as instances of biopower.

The post-2001 tightening of connections between illegal markets and terrorism perhaps represents a further extension of this phenomenon. In this imaginary, every migrant entrant—and particularly those who are unauthorized—potentially harbors drugs, criminal organizational intentions, connections with prostitution, and ultimately connections with terrorism. The supranational integration of efforts to combat against such threats, in this line of thinking, unifies the “discourse of terrorism” with the “discourse of globalization.”<sup>68</sup> In this “biopolitical” order, “the ‘enemy’ is simultaneously ‘banalized’ (reduced to an object of routine police repression) and absolutized (as the Enemy, an absolute threat to the ethical order).”<sup>69</sup>

The effort to combat trafficking, in my view, both assuages the conscience of the would-be prosecutor and adds to the general alarm and atmosphere of anxiety that further enables the expansion of the police power through the creation of a “moral panic.”<sup>70</sup> The conceptual unification of trafficking with prostitution, viewed in this light, can be seen as a particular and essential component in the growth of biopower. Sex contaminates the female body, and the contaminated female body in turn corrupts the social body.<sup>71</sup> Hence, cross-border prostitution invokes the notion of a contaminant on many different levels.<sup>72</sup>

The social reaction takes the form of a strong movement to repel

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68. WALTER BENN MICHAELS, *THE SHAPE OF THE SIGNIFIER: 1967 TO THE END OF HISTORY* 224 (2004).

69. *Id.* at 224 (quoting MICHAEL HARDT & ANTONIO NEGRI, *EMPIRE* 6 (2000)).

70. See Thomas, *supra* note 46.

71. For treatments of the relationship between the body, sexuality, and “border phenomena,” see Siobhan Somerville, *Scientific Racism and the Invention of the Homosexual Body*, in *THE GENDER/SEXUALITY READER* 37 (Micaela di Leonardi & Roger Lancaster eds., 1997); Abdul R. JanMohamed, *Sexuality on/of the Racial Border: Foucault, Wright and the Articulation of Racialized Sexuality*, in *DISCOURSES OF SEXUALITY: FROM ARISTOTLE TO AIDS* 94 (Donna Stanton ed., 1992); ANN STOLER, *RACE AND THE EDUCATION OF DESIRE* (1995); Biddy Martin & Chandra Mohanty, *Feminist Politics: What Does Home Have To Do With It?*, in *FEMINIST STUDIES, CRITICAL STUDIES* 191 (Teresa de Laurentis ed., 1986).

72. “Disgust concerns the borders of the body: it focuses on the prospect that a problematic substance may be incorporated into the self.” MARTHA NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME AND THE LAW* 88 (2004).

the contaminant. An historical review of anti-prostitution campaigns in the United States, for example, demonstrates that crackdowns have often arisen in social contexts that also featured anxiety about increased immigration.<sup>73</sup> This explains why, although the putative focus is the assistance of the victims of trafficking, the actual responses are in the vein of criminal enforcement and border-tightening.<sup>74</sup> This disparity between the punitive elements of the legal

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73. First, the cross-border procurement of prostitution was criminalized both nationally and internationally. The 1910 Mann Act provided that “[a]ny person who shall knowingly transport, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce . . . any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice . . . shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding \$5,000 or by imprisonment of not more than five years, or by both.” White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424 (2006)).

The 2000 Trafficking Victims Protection Act establishes a criminal sentence for “severe forms of trafficking in persons,” which is defined to mean “(A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age;” or “(B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.” Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended at 22 U.S.C. §§ 7101–7110 (2006)).

The Trafficking Protocol also calls for the establishment of criminal offences for the “trafficking of persons,” which is defined to mean:

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

See Trafficking Protocol, *supra* note 40, art. 5. Second, provisions were made for the “victims” to be repatriated to their home countries. *Id.* art. 8. See also Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641 (2005) (showing how immigration panics were influenced by the perception of widespread prostitution by immigrant women from China).

74. Elizabeth M. Bruch, *Models Wanted: The Search for an Effective Response to Human Trafficking*, 40 STAN. J. INT’L L. 1, 16, 32 (2004) (noting that, although trafficking can be addressed through a human rights framework, a labor framework, or a law enforcement framework, “[a]ll of the international documents addressing human trafficking in detail have essentially embodied a law enforcement perspective,” and “the law enforcement framework has dominated the international

response and the victim-assistance elements is consistent with an explanation of the law as primarily serving the ends, first, of *building state power* and, second, of *assuaging cultural concerns about social identity*.

The “constructivist” approach in international relations theory also offers an explanation linking these symbolic dynamics within states to the incentives affecting the coordination of state behavior. The constructivist approach to international relations would view those political and social fault lines not only as part of the explanation but as central and would investigate the ways in which ideas and cultures shape states’ perceptions of their own interests. Constructivist theorists argue that ideas influence political behavior in a variety of ways, including serving as road maps in the face of uncertainty.<sup>75</sup>

Employing the constructivist approach, the operative concept here is of social identity as an in-group versus out-group phenomenon. Beyond the liberal notion of individual human flourishing is Carl Schmitt’s idea of fear as a ruling political emotion—“all political actions and motives can be reduced to the distinction between friend and enemy.”<sup>76</sup> This distinction becomes symbolically charged at the border.

#### V. PROHIBITIONISM PROBABLY MAKES ILLEGAL MARKETS MORE DANGEROUS

The normative ordering described above could be perceived by some as a legitimate—if controversial—corollary of the sociolegal facts of national identity, territorial sovereignty, and citizenship. However, the social benefits of policing identity must be considered in light of the probable social costs, which include the ironic, or tragic, likelihood that criminalizing markets in many cases probably does not decrease them but only renders them more violent. In this sense, the criminalization process turns into self-fulfilling prophecy: illegal markets are viewed as threats, fueling a crackdown which actually has the effect of amplifying the threat posed by said markets.

The logic behind the likely futility of prohibitionism is

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response to human trafficking . . .”).

75. See *generally* IDEAS AND FOREIGN POLICY: BELIEFS, INSTITUTIONS AND POLITICAL CHANGE (Judith Goldstein & Robert O. Keohane eds., 1993).

76. CARL SCHMITT, THE CONCEPT OF THE POLITICAL 26 (George Schwab trans., 1976).

fundamentally economic, stemming from the material conditions that produce and shape illicit transactions. In this section, I will discuss two arguments from economics that predict that prohibitionism exacerbates rather than reduces market criminality. In the context of undocumented migrant workers, this means that the incidence of illegal migration will not likely reduce in response to crackdowns but will likely become more dangerous for the migrants themselves and for society in general.

The first argument is that illegal markets are deeply rooted in the dynamics of globalization: “push” and “pull” factors that criminalization will not affect. The second argument is that criminalization, though it will not necessarily reduce the *level* of illicit market activity in a significant way, will tend to *shift* the type of suppliers from a decentralized to a centralized one, thereby encouraging the growth of organized crime.

A. “Push” and “Pull” Dynamics of Globalization

The robustness of illicit markets arises out of three variables: deep demand, deep supply, and the capacity to connect the two in a global marketplace.

The demand in industrialized “receiving countries” for the illicit goods and services provided by developing countries and targeted by the Crime Conventions is extensive. Demand for illicit narcotics has not declined despite the decades-old War on Drugs.<sup>77</sup> Employer demand for undocumented labor is all but an open secret in the U.S.,<sup>78</sup> where undocumented migrant farm workers hired seasonally in the U.S. outnumber those workers who are legally admitted.<sup>79</sup> U.S.

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77. U.N. OFF. ON DRUGS & CRIME, 2006 WORLD DRUG REPORT, at 33, U.N. Sales No. E.06.XI.10 (2006) (asserting that world drug consumption has “remained stable” but warning that recent changes in methodology may account for the lack of increase).

78. See, e.g., Elizabeth M. Dunne, *The Embarrassing Secret of Immigration Policy*, 49 EMORY L.J. 623, 626–27 (2000).

79. See RUTH ELLEN WASEM & GEOFFREY K. COLLVER, IMMIGRATION OF AGRICULTURAL GUEST WORKERS: POLICY, TRENDS, AND LEGISLATIVE ISSUES 1 (2003) (citing U.S. DEPARTMENT OF LABOR, FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY 1997–1998, Research Report No. 8 (March 2000) (“U.S. Department of Labor (DOL) data estimate that, by 1999, over half (52%) of U.S. farm workers were unauthorized, up from 37% in 1995.”)). In point of fact, the federal H-2A program “exists to meet agricultural labor shortages” and has been recognized as the “only thing standing between labor shortages and significant fines.” William M. Ross, *The Road to H-2A and Beyond: An Analysis of*

demand for services in the entertainment and prostitution industries associated with human trafficking is vast.<sup>80</sup>

The return rate available to actors in “sending countries” from supplying receiving-country demand in illicit sectors often exceeds that from legal foreign markets, not to mention local demand. The price Bolivian farmers can charge for coca base is at least fifty-fold the price available from legal crops such as coffee or soybeans.<sup>81</sup> The average manufacturing wage in the U.S. was US\$23.65, or US\$31.81 in the Netherlands, compared to US\$2.63 in Mexico, or US\$4.54 in Poland.<sup>82</sup> The average income of a farm worker in the U.S. is very low by U.S. standards—below the poverty line at between US\$10,000 and US\$12,499<sup>83</sup>—but high by comparison to the average Mexican income of less than 5,000 *pesos*.<sup>84</sup>

In addition to price comparisons as drivers of illicit demand and supply, global economic analysis points to the background dynamics of shifting resource allocations across markets. Globalization both dislocates local labor forces (through competition with imported products) and creates new labor forces (through the creation of new

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*Migrant Worker Legislation in Agribusiness*, 5 DRAKE J. AGRIC. L. 267, 276–78 (2000) (assessing the program).

80. ELIZABETH BERNSTEIN, *TEMPORARILY YOURS: SEXUAL COMMERCE IN POST-INDUSTRIAL CULTURE* 1–7 (2007).

81. In 1999, the “farmgate” price per kilogram of coca base in Bolivia was estimated by the UN to be US\$900. U.N. OFFICE ON DRUGS & CRIME, *GLOBAL ILLICIT DRUG TRENDS 2000*, at 46, U.N. Sales No. E.00.XI.10 (2000) [hereinafter *GLOBAL ILLICIT DRUG TRENDS 2000*]. In 1999, prices for Bolivia’s major legal cash crops were US\$19 per kilogram of coffee—about two percent of the going price for the equivalent amount of coca base; and about US\$2 per kilo of soybeans—about 0.2 percent of the coca base price. *See id.*; FOOD & AGRIC. ORG. OF U.N., *THE STATE OF FOOD AND AGRICULTURE 2001*, at 9, 13, (FAO Agriculture Series No. 33,2002) (reporting declining world prices per ton for coffee and only marginal increase for soybeans in 2000).

82. UNITED STATES DEP’T OF LABOR, BUREAU OF LABOR STATISTICS, *INTERNATIONAL COMPARISONS OF HOURLY COMPENSATION COSTS FOR PRODUCTION WORKERS IN MANUFACTURING*, 2007, at 13 (2009), *available at*: [www.bls.gov/news.release/pdf/ichcc.pdf](http://www.bls.gov/news.release/pdf/ichcc.pdf).

83. Thirty percent of all families below the poverty guidelines. U.S. DEP’T OF LABOR, OFFICE OF THE ASSISTANT SEC’Y FOR POLICY, OFFICE OF PROGRAMMATIC POLICY, *FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY, 2001–2002*, at 47 (2005), *available at* [www.dol.gov/asp/programs/agworker/report9/naws\\_rpt9.pdf](http://www.dol.gov/asp/programs/agworker/report9/naws_rpt9.pdf).

84. *See* Inter-American Development Bank, *Statistics on Mexico 1996*, Table I.1 (reflecting a mean national income of 366 pesos per month for the third quintile of the country population).



export-competitive sectors). For example, in Mexico, workers may leave rural farms, being unable to compete with U.S. agribusiness imports; they may then migrate to where new farm work can be found, in the U.S.<sup>85</sup>

In this sense, globalization renders criminal “ordinary” poor people in developing countries—not only by drawing them to labor markets in developed countries without documentation status but also by potentially increasing the lure of cash available in other criminal markets. (For an acclaimed fictional rendition of this perspective, see the recent film *Maria Full of Grace* about a poor Colombian girl who decides to leave her job in a garment factory to traffic drugs into the United States.)

Thus, empirical data seem to refute a heretofore-prominent strain of trade theory, which sees trade and migration as substitutes: that is, if a labor-rich and capital-rich nation open their borders to each other, the labor-rich nation will export labor-intensive goods to the capital-

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85. As commentator Philip Martin describes:

Historically, corn in Mexico was highly protected: a guaranteed price of corn twice the world price has served as the social safety net in rural areas. Mexico had about 3 million corn farmers in the mid-1990s, but the 75,000 corn farmers in Iowa produced twice as much corn as Mexico, at half the price. In this example, more US exports of corn will stimulate more Mexican exports of labor. [Similarly, suppose] Mexican workers are more productive in the United States than they are in Mexico because of better public and private infrastructure. Migration can then complement trade. This occurred when much of the Mexican shoe industry shifted from Leon, Mexico to Los Angeles, California in the 1980s. The somewhat surprising result was that shoes produced with Mexican workers in Los Angeles were exported to Mexico in larger volumes when NAFTA lowered barriers to trade. By converting less productive Mexican workers into more productive US workers, NAFTA discouraged the production of a labor-intensive good in Mexico, and encouraged migration to the United States.

Philip Martin, *Mexico-U.S. Migration*, (Institute for International Economics, Working Paper) (on file with author).

In this paper, Martin includes an interesting discussion of the ramifications of this dynamic for traditional trade theory:

In standard Heckscher-Ohlin trade theory, capital-rich Country N will import labor-intensive goods from labor-rich Country S. Trade liberalization shifts additional production of labor-intensive goods to Country S and capital-intensive goods to Country N. These production shifts in turn put upward pressure on Country-S wages, discouraging emigration. By contrast with the standard trade story, when technology differs between countries, trade and migration can be complements, not substitutes.

*Id.*

rich nation. In fact, where the two nations are producing in the same sectors, migration and trade can serve as complements: the cheaper workers from the labor-rich country may migrate to the capital-rich country to increase productivity even further, and exports from the capital-rich country will displace workers in the labor-rich country. Philip Martin has written on how this twist occurred in the context of NAFTA:

Studies on NAFTA's prospective impact agreed that the bulk of the additional jobs due to NAFTA would be created in Mexico. One hoped-for side effect of NAFTA was a reduction in unauthorized migration. This did not happen. Instead, the number of unauthorized Mexicans living in the United States rose from an estimated 2.5 million in 1995 to 4.5 million in 2000, representing an annual increase of 400,000 a year.<sup>86</sup>

Alternatively, illegal migrants may follow a pattern of internal-then-external migration, pursuing new work in domestic border-area export processing zones from which cross-border migration—increasingly facilitated by human-smuggling operations—is a short step. This internal-then-external migration often reverses but otherwise mirrors transnational capital flows. That is, when a U.S. business invests in Mexico, old labor markets are displaced and new labor markets are created, and simultaneously, new transnational networks in communication and transportation are forged, creating a hydraulic that draws migrant workers into the stream of transnational labor markets.<sup>87</sup>

International capital flows generate yet another lever of dislocation in the form of currency devaluation. The 1990s featured a series of very prominent and very similar collapses in “emerging” securities markets in poor countries—Mexico in the mid-1990s, East Asia in the late 1990s, and so on. Both market pressure and pressure from the international community led to concomitant currency devaluations which proved enormously disruptive to local economies.<sup>88</sup> Economic contraction in local markets, coupled with increased desirability of

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86. *Id.*

87. See generally SASKIA SASSEN, *THE MOBILITY OF LABOR AND CAPITAL, A STUDY IN INTERNATIONAL INVESTMENT AND LABOR FLOW* (1990); SASKIA SASSEN, *THE GLOBAL CITY: NEW YORK, LONDON, TOKYO* (1991).

88. Martin, *supra* note 85 (“The number of maquiladoras and their employment increased sharply after several peso devaluations, and reached a peak of 1.3 million in 2000.”).

hard-currency wages, may well have reinforced the migrant stream and consequently would have led to some increase in the proportion of migrants who “fed” illicit markets in one way or another—by hiring a smuggler so as to find work across the border or by working in the drug trade, the sex trade, or organized crime.

Movement across such illicit markets occurs more easily against a background of lowered transaction costs generated by the deep transformations of economic globalization. These efficiencies in the global economy arise from both technological gains in transportation and communication and reduced tariff barriers arising out of trade liberalization agreements. Increased legal trade-flows across borders beget increased illegal trade-flows by creating opportunities to use otherwise legal commercial carriers for smuggling.<sup>89</sup> In addition, increased volume of cross-border traffic translates into decreased effectiveness of border inspection.<sup>90</sup>

Thus, globalization is powerfully at work in generating the material conditions and causes that drive international criminal trade. This does not mean, from a lawmaker’s perspective, that unauthorized migration, for example, should be considered as *equivalent to* drug trafficking or the sex trade. Regulatory considerations relating to political and social costs and benefits will vary widely across these instances of cross-border illicit economies. The point here is not to equate all illicit transactions but rather to demonstrate how conditions of economic globalization contribute to creating the conditions for transnational illegal markets as well as the possibility for interlocking effects among these markets.

### B. *Organized Crime and the Theory of the Firm*

With these push and pull dynamics in play, global illicit markets often display the same complexities of consumption and production patterns as their counterparts in legal trade and development.<sup>91</sup> The

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89. Kal Raustiala, *Law, Liberalization & International Narcotics Trafficking*, 32 N.Y.U. J. INT’L L. & POL. 89, 117–18 (1999).

90. *See id.* at 120–21.

91. Chantal Thomas, *Illegal Markets, Globalized Trade Flows, and International Legal Relations*, (Sep. 22, 2006) (unpublished manuscript on file with the UCLA Friday Faculty Colloquium). The United States Bureau for International Narcotics and Law has observed that “[t]he relatively simple charts of drug flows” of previous eras “now resemble schematic drawings of intricate . . . networks tying nearly every country in the world to the . . . drug production and trafficking countries.” BUREAU FOR INT’L NARCOTICS AND LAW, U.S. DEP’T OF STATE, INT’L

black market version of the “firm” is the organized crime syndicate.

The famed economist Ronald Coase’s “theory of the firm” predicts that businesses will consolidate and internalize some kinds of market activities to reduce transaction costs and, where possible, extract monopoly rents.<sup>92</sup> Consequently, some market actors will coordinate and consolidate channels of production, distribution, and marketing. Thus, as criminalization makes doing business more difficult, Coase’s theory predicts that illegal firms will consolidate to internalize costs. Prohibition may therefore lead to larger and better-organized crime. Relatedly, prohibition may increase the violence and instability associated with illicit transactions, since illegal contract disputes cannot be resolved using the legal system.

Moreover, criminal prohibitions, by restricting supply, can lead to a significant increase in the market price of the restricted item, so that some suppliers who can still access the market enjoy a price-increase “windfall”—a perverse consequence of a restriction that sought to weaken them.<sup>93</sup> Such restrictions are also said to be relatively susceptible to corruption, because they encourage rent-seeking actors to mobilize to monopolize the restricted market.<sup>94</sup> Thus, suppliers use some of the windfall to pay off law enforcement authorities, retaining the rest and coming out ahead in the bargain.

In addition, because these prohibitions also impose increased costs associated with greater difficulty in gaining market access and the risk of prosecution, they may have the effect of increasing the monopoly power of suppliers who are able and willing to absorb the increased costs—hence the tendency towards large and internally hierarchical crime syndicates in which “kingpins” are protected by layers of rank-and-file operators. In the case of illegal markets, this

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NARCOTICS CONTROL STRATEGY REPORT (1998).

92. For an overview of Coasian theory as applied to the firm, see Stewart J. Schwab, *Coase’s Twin Towers: The Relation between The Nature of the Firm and The Problem of Social Cost*, 18 J. CORP. L. 359, 360–62 (1993).

93. For a general explanation of the economic theory of the effect of restrictions on gains from trade, see RICHARD E. CAVES, JEFFREY A. FRANKEL & RONALD W. JONES, *WORLD TRADE AND PAYMENTS: AN INTRODUCTION* (10th ed. 2007).

94. Cf. Jimmie S. Hillman, *Nontariff Barriers: Major Problem in Agricultural Trade*, 60 AM. J. AGRIC. ECON. 491, 492–93 (1978) (describing the phenomenon in a more typical trade setting, that of quantitative restrictions on agricultural imports). For a description of this problem in Latin America, see Luz Estella Nagle, *The Challenges of Fighting Global Organized Crime in Latin America*, 26 FORDHAM INT’L L.J. 1649, 1679–81 (2003).

effect means that those suppliers who can survive criminal law enforcement attempts actually enjoy greater market power than they might have in the absence of criminal prohibition. This dynamic may well encourage the development and consolidation of powerful organized crime—another perverse consequence of the prohibitions that sought to eliminate the crime. Given the relatively high transaction costs associated with illegal business, criminalization may have the effect of making organized crime more likely and more dominant.

Under such background economic conditions, Coase's theory of the firm predicts not that the incidence of illicit market transactions would not diminish as a result of criminalization but rather would be largely unaffected but that organized crime groups would gain ascendance over less centralized regimes as intermediators of those transactions.

The stated objectives of international criminal trade law and related enforcement efforts are, firstly, to reduce the incidence of these crimes and, secondly, to increase border security. For the foregoing reasons, however, these prohibitionist measures appear to be suboptimal. Suboptimality results not only from limited effectiveness but also from the regime's effect of exacerbating the very problems it seeks to solve.

Despite these policing efforts, illicit markets continue to provide an important source of revenue for many developing economies.<sup>95</sup> Most troubling, organized crime appears to be overtaking more decentralized modes of supplying markets for illegal drugs and migrant labor.<sup>96</sup> The shift to organized crime increases the likelihood

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95. See U.N. OFF. ON DRUGS & CRIME, ALTERNATIVE DEVELOPMENT: A GLOBAL THEMATIC EVALUATION, at 1–2, U.N. Sales No. E.05.XI.13 (2005). The United States government has sought to reassure the international community that the current approach has been successful despite some evidence to the contrary. Compare U.N. Says Afghan Poppy Cultivation Could Rise After Last Year's Record, INT'L HERALD TRIB., March 6, 2007, available at <http://www.iht.com/articles/ap/2007/03/06/asia/AS-GEN-Afghan-Drugs.php>, with U.S. Official Claims Progress in Ending Opium Cultivation in Northern Afghanistan, INT'L HERALD TRIB., March 9, 2007, available at <http://www.iht.com/articles/ap/2007/03/09/europe/EU-GEN-US-Afghan-Drugs.php>.

96. Louise Shelley, *Crime Victimizes Both Society and Democracy*, 6 GLOBAL ISSUES 19, 19 (2001), available at <http://www.iwar.org.uk/ecoespionage/resources/transnational-crime/gj06.htm> ("The increasing visibility, assets, and political influence of organized criminal groups have become a matter of mounting

of terrorist involvement.<sup>97</sup>

The theory of the firm explains the syndication of illicit market activities but not the distinctive features of organized crime in its heavy use of violence and intimidation. These tactics can be explained, however, as ordering techniques employed in the absence of nonviolent means of settling disputes through the legal system or through other “mainstream” processes. Thus, the shift to organized crime also increases the violence and associated dangers of illegal transactions.

The circumstances of illegal migration show most starkly the human cost of these newer, more virulent strains of criminal trade: although illegal migrants have not declined in numbers,<sup>98</sup> they are more likely to take more dangerous routes<sup>99</sup> and to employ the services of organized criminal operators.<sup>100</sup> Death rates have increased for illegal migrants as measures have been implemented to crack down on national borders.<sup>101</sup> If it is true that the consequences of deep criminalization make the problem worse, then it is not a wholly rational endeavor assuming that the reduction of criminality is in fact the goal.

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international concern in recent years.”).

97. See Donnie Marshall, *Narco-Terrorism: The New Discovery of an Old Connection*, 35 CORNELL INT’L L.J. 599, 601–03 (2002); Alexandra V. Orlova & James W. Moore, “Umbrellas” or “Building Blocks”? : *Defining International Terrorism and Transnational Organized Crime in International Law*, 27 HOUS. J. INT’L L. 267, 303–06 (2005) (emphasizing the evolving nature of the interrelationships between organized crime, terrorism, and “legitimate society” and summarizing the difficulties this imposes on precise definitions).

98. Bill Ong Hing, *The Dark Side of Operation Gatekeeper*, 7 U.C. DAVIS J. INT’L L. & POL’Y 121, 131 (2001) (providing statistics to show that the increase in border policing under the U.S. government’s Operation Gatekeeper has not decreased “apprehension levels”).

99. *Id.* at 135.

100. See generally Jacqueline Marie Hall, *Sink or Swim: The Deadly Consequences of People Smuggling*, 12 IND. INT’L & COMP. L. REV. 365 (2002) (describing migrant smuggling in Europe and Australia).

101. Daniel A. Scharf, *For Humane Borders: Two Decades of Death and Illegal Activity in the Sonoran Desert*, 38 CASE W. RES. J. INT’L L. 141, 143 (2006) (“[T]he death toll for people illegally migrating into the United States . . . along the U.S.-Mexico border . . . in the America’s Southwestern Deserts has risen since the U.S. government launched Operation Gatekeeper in 1994.”).

## VI. MATERIAL ORDERING EFFECTS: THE SHADOWED TERRAIN OF THE MIGRANT WORKER

The above sections have described how, in the pluralistic array of international legal regimes potentially governing illegal migration, the most prominent and influential norms arise within international criminal law. Given that international criminal law and its prohibitions will probably not significantly reduce the level of unauthorized migration but may increase the dangers and threats associated with it, the overarching result increasingly situates migrant labor against a relief of fear and prosecution.

This section details some of the ways in which U.S. lawmaking, subsequent to the emergence of the Crime Conventions, has operated to strengthen and reinforce the criminality of the undocumented migrant worker. Such effects might be viewed as correlations or results of activity on the international terrain—the directionality of causation is less a concern here than demonstrating the argument that national legal events are a part of the same global social field which the international legal regimes described above also inhabit.

The wave of debates over and proposals for immigration reform in the United States are probably the most salient among these effects. Despite repeated efforts by U.S. President Bush to promote a guest worker law that would ease entry by migrant workers, the U.S. legislature—which tends to be more closely tied to populist sentiment—repeatedly proved hostile.<sup>102</sup> Moreover, even a guest worker program may only temporarily reduce rather than abate the problem, since its restrictions and requirements might have the effect of turning once-legal guest workers into illegal migrants. Populist sentiment has also encouraged some U.S. states to act ostentatiously to convey concern about illegal immigration.<sup>103</sup> Indeed, illegal immigration was a campaign issue in the U.S. presidential election of 2008 and is likely to remain contentious in the future.

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102. See, e.g., Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458 (2009) (“In the final years of the Bush Administration, several attempts were made to expand existing guest worker programs to enable the admission of greater numbers of workers, primarily through broadening the definition of the types of workers eligible for the temporary visas.”).

103. See, e.g., ‘State of Emergency’ Changes the Border Political Fight, USA TODAY, Aug. 30, 2005, [http://www.usatoday.com/news/nation/2005-08-30-border-emergency\\_x.htm](http://www.usatoday.com/news/nation/2005-08-30-border-emergency_x.htm).

Less widely known, perhaps, than these events in the political processes of the executive and legislative branch are changes in the law arising out of the judicial process. Yet immigration advocates see these changes as at least as devastating for migrant workers. In particular, the 2002 Supreme Court decision of *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*<sup>104</sup> found that undocumented workers who are laid off because of their union organizing efforts have no recourse under U.S. labor law.

In the same case, ten years before, the National Labor Relations Board had found that “four union supporters had sufficient seniority that they would have been retained absent their discriminatory selection for layoff.”<sup>105</sup> As the case worked its way up the appeals process, as late as January 2001, the federal appeals court for the District of Columbia held that the U.S. labor relations statute did not bar undocumented employees from receiving back pay as a remedy for undocumented workers who were discriminatorily laid off due to their union organizing efforts.<sup>106</sup>

The Supreme Court majority in *Hoffman* justified its holding straightforwardly, arguing that extending labor law protections to undocumented workers would “trivialize” U.S. immigration laws.

Yet, the dissenting opinion rejected the proposition that the majority could “comfortably rest its conclusion upon the immigration laws’ purposes.”<sup>107</sup> In doing so, the dissent alluded to the underlying forces of globalization:

For one thing, the general purpose of the immigration statute’s employment prohibition is to diminish the attractive force of employment, which like a magnet pulls illegal immigrants towards the United States. To permit . . . backpay could not significantly increase the strength of this magnetic force, for so speculative a future possibility could not realistically influence an individual’s decision to migrate illegally.

To deny . . . backpay, however, might very well increase

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104. 535 U.S. 137 (2002).

105. *Hoffman Plastic Compounds, Inc. and Casimiro Arauz, an Individual*, 306 NLRB 17 (1992).

106. *Hoffman Plastic Compounds, Inc. v. NLRB*, 237 F.3d 639, 642 (D.C. Cir. 2001).

107. *Hoffman*, 535 U.S. at 155 (Breyer, J., dissenting).



the strength of this magnetic force. That denial lowers the cost to the employer of an initial labor law violation (provided . . . that the victims are illegal aliens). It thereby increases the employer's incentive to find and hire illegal-alien employees.<sup>108</sup>

Thus, the result of the *Hoffman* decision is that the employer was able to "dismiss[] an employee for trying to organize a union—a crude and obvious violation of the labor laws" were it not for the majority's decision to withhold the protection of those laws.<sup>109</sup>

The dissenting justices pointed to a troubling effect of the crackdown on illegal immigration in a context where globalization renders such immigration inevitable—intentionally or not, the crackdown has the effect of rendering workers more vulnerable to abuses by employers. Not only will the law refuse to help undocumented workers in any efforts they might make to protect themselves against employer abuse or to improve their workplace conditions; documented, legal workers will also find their own bargaining efforts undermined, since the employer can hire undocumented workers who can be abused with impunity.

In this sense, it has occurred to me that a useful thought experiment is to compare the laws enforcing chattel slavery in the antebellum United States with those enforcing immigration laws today. What made slavery a product of the law was that, as long as someone held the status of slave and another the status of his or her slaveowner, the law would not only refuse to give the slave recourse against the slaveowner but would also aid the slaveowner in maintaining the slave in a position of complete vulnerability. Consider, for example, the Fugitive Slave Law, which required the return of runaway slaves.

Slavery could work as a system of extreme subordination only because of a social field in which a vulnerable population was prevented from exercising rights against its controllers. While the term "modern-day slavery" is used by, for example, anti-trafficking and anti-slavery spokespersons to describe forced prostitution or compulsory labor in the developing world, we should consider the extent to which immigration laws in *developed* countries, operating

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108. *Id.* (Breyer, J., dissenting) (internal citations omitted).

109. *Id.* at 153 (Breyer, J., dissenting).

against a social field of globalization, in a context of international criminalization of migrants, might resemble slavery laws to an uncomfortable degree.

The immediate response to this argument would be that slaves did not choose to enter the territories in which they were enslaved, whereas illegal migrants do make that choice. Thus, the persuasiveness of the argument depends on the degree to which one accepts that economic coercion is a social fact and factor in the larger complex of globalizing forces. Of course, even if migrant workers choose to enter into such circumstances because of the benefits available there from remittances and higher wages, social justice concerns still necessitate the improvement of workplace conditions.

Following *Hoffman*, U.S. and Mexican labor unions filed a complaint with the ILO Committee alleging that the U.S. Supreme Court's decision violated the ILO treaties mentioned in Part II, above. The Committee observed that "the impact of *Hoffman* . . . includes undocumented workers hired by employers in full knowledge of their status and who may subsequently be dismissed for exercising their fundamental right to organize in an effort to ensure respect for basic worker's rights."<sup>110</sup> The Committee concluded that "the remedial measures left [under U.S. labor law] in cases of illegal dismissals of undocumented workers are inadequate to ensure effective protection against acts of anti-union discrimination."<sup>111</sup>

At the same time, the Committee declined to specify "what precise remedy" would fulfill international law principles of nondiscrimination and freedom of association.<sup>112</sup> Thus, the Committee "invite[d] the Government to explore . . . possible solutions."<sup>113</sup>

In this way, liberal, egalitarian impulses within international law have been recognized, but ultimately subordinated, to a concept of the undocumented migrant worker as a criminal.<sup>114</sup>

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110. ILO Committee on Freedom of Association, Complaint Against the Government of the United States Presented by AFL-CIO, Case. No. 2524, para. 856, in 349th Report of the Committee on Freedom of Association, ILO Doc. GB.301/8, para. 749 (2008, Series B).

111. *Id.* para. 610.

112. *Id.* para. 611.

113. *Id.*

114. "This Court has consistently set aside . . . backpay awards to employees

## VII. CONCLUSION

The above analysis has considered the case of illegal markets, particularly the market for illegal migration, through the lens of legal pluralism. This scenario is one not just of legal pluralism but also legal fragmentation.<sup>115</sup> Indeed, in his influential report on fragmentation for the International Law Commission, Martti Koskenniemi describes the problem at hand:

“Trade law” develops as an instrument to regulate international economic relations. “Human rights law” aims to protect the interests of individuals and “international criminal law” gives legal expression to the “fight against impunity.” Each rule-complex or “regime” comes with its own principles, its own form of expertise and its own “ethos,” not necessarily identical to the ethos of neighbouring specialization.<sup>116</sup>

Koskenniemi addresses the juristic problems posed when legal regimes collide with each other not only in their specific rules but also in their larger goals. Thus, although the *general* thrust of trade law is to liberalize markets, and the *general* thrust of human rights law is to protect individuals, both of these regimes tend not to reach, formally or informally, the issues posed by illegal migration. At the same time, the *general* effect of criminalization, promoted both internationally and nationally, may be viewed as hostile not only to the liberalization of markets for migrant labor but possibly also to the protection of individual migrant workers.

“Global legal pluralism . . . is not simply a result of political pluralism, but is instead the expression of deep contradictions between colliding sectors of a global society.”<sup>117</sup> This legal pluralism

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found guilty of serious illegal conduct in connection with their employment.” *Hoffman*, 535 U.S. 137 (Syllabus).

115. See Fragmentation, *supra* note 8, para. 8 (defining fragmentation as “the emergence of specialized and (relatively) autonomous rules or rule-complexes, legal institutions and spheres of practice”).

[S]uch specialized law-making and institution-building tends to take place with relative ignorance of legislative and institutional activities in the adjoining fields and of the general principles and practices of international law. The result is conflicts between rules or rule-systems, deviating institutional practices and, possibly, loss of an overall perspective on the law.

*Id.*

116. *Id.* para. 15.

117. Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The*

is not necessarily the juristic kind as traditionally understood; that is, the “transfer of whole legal systems across cultural boundaries” has occurred in territories that were subjected to colonial rule.<sup>118</sup> At the same time, the immediately preceding paragraph suggests that juristic pluralism may appear here, if it is defined as a situation in which the “sovereign commands different bodies of law for different groups of the population varying by ethnicity, religion, nationality, or geography, and when the parallel legal regimes are all on dependent on the state legal system.”<sup>119</sup>

One could argue that national regimes (enforced through international law in both its assertions and its omissions) prohibiting migration, in a context where it is inevitable given the dynamics of globalization, in fact maintain, in an ongoing rather than contingent or temporary fashion, a system in which undocumented workers are acknowledged and expected but, by virtue of their status, are subject to a different (and lesser) system of laws. In a world where territorial boundaries are porous but nevertheless serve as a basis for distinguishing identity,<sup>120</sup> this system of managing persons according to documentary status seriously reinforces global socioeconomic hierarchy.

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*Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT’L L. 999, 1004 (2004).

118. Barry Hooker, *LEGAL PLURALISM: AN INTRODUCTION TO COLONIAL AND NEO-COLONIAL LAWS* 1 (1975).

119. Merry, *supra* note 1, at 871.

120. See generally Richard T. Ford, *Law’s Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843 (1999).